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Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-737

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ and EVA FLOYSTRUP,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DeVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY AS AMICUS CURIAE

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OPINION BELOW

The opinion of the California Supreme Court is reported at 27 Cal.3d 819, 614 P.2d 742, 167 Cal.Rptr. 84 (1980). The opinion of the California Court of Appeal is reported at 99 Cal.App.3d 736, 160 Cal.Rptr. 448 (1979).

JURISDICTION

The petition noting probable jurisdiction was filed on November 5, 1980, and probable jurisdiction was noted by this Court on February 23, 1981. The Jurisdiction of the Court is pursuant to Title 28, U.S.C., section 1257(2).

CONSENT FOR FILING

This Amicus Curiae brief is being filed with the written consent of all parties to the proceedings.

QUESTION PRESENTED

Whether a city may, consistent with the First Amendment to the United States Constitution, limit the amount of money a person may contribute to a campaign committee which either supports or opposes a ballot measure in an election.

INTEREST OF THE AMICUS CURIAE

Pacific Gas and Electric Company (PGandE) is one of the world's largest investor-owned combined gas and electric utilities. Incorporated in California in 1905, it serves 48 of California's 58 counties.

For more than 75 years, PGandE has owned and operated an integrated system serving the inhabitants of Berkeley and adjoining communities with electricity. In April 1973, the City of Berkeley voted on an intiative measure which asked its voters whether the City of Berkeley should condemn the electric facilities of PGandE and operate said facilities itself. By a substantial majority, the voters rejected the proposal for the City to take over and operate the PGandE electric facilities.

On June 4, 1974, the voters of the City of Berkeley passed Municipal Ordinance No. 4700-NS (Election Reform Act of 1974) making it a crime for PGandE or any other business entity to make any expenditures or contributions in connection with a Berkeley municipal election. Shortly, thereafter, on August 8, 1974, the Berkeley City Council placed on the November 5, 1974 municipal ballot Measure "W" requiring the acquisition by the City of Berkeley of PGandE's electric distribution facilities.

Obviously, PGandE was vitally concerned with the proposed forced acquisition of its business and assets in Berkeley, but because of the Berkeley Election Reform Act of 1974, it was precluded from communicating its views on Measure "W." Consequently, on August 27, 1974, PGandE filed a complaint in the Alameda County Superior Court seeking injunctive and declaratory relief alleging that the Berkeley ordinance violated its right to the equal protection of the law and its right of free speech as guaranteed under the California Constitution and the First Amendment to the United States Constitution.

On August 27, 1974, the court issued a temporary restraining order prohibiting enforcement of the ordinance against PGandE. A preliminary injunction was issued on September 19, 1974, and a permanent injunction was granted on October 15, 1974. At the November 5, 1974, election the Berkeley voters again rejected the city's bid to acquire the electric facilities of PGandE.

On appeal to the California Court of Appeal, the court, in an unanimous decision, held those provisions of the Election Reform Act prohibiting PGandE from expending money to communicate its view to the voters to be unconstitutional. *Pacific Gas and Electric Company* v. *City of Berkeley*, 60 Cal.App.3d 123, 131 Cal.Rptr. 350 (1976).

Since 1974, and to the present, there has been a continuing interest in Berkeley in acquiring PGandE's electric facilities. Therefore, PGandE, whose electrical facilities have been the subject of two prior elections, has a vital interest in the enforcement of section 602[1] of the Berkeley ordinance, which limits to $250 the amount a person may donate to a committee formed either to support or oppose a ballot measure.

STATEMENT OF THE CASE

At the April 9, 1977, Berkeley municipal election, the electorate voted on Measure "B," a proposal to amend the city's

[1] Section 602 reads as follows:

No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250).

charter to create a rent control board that was empowered to set the rates for most rental units in the city.

The measure created considerable controversy in Berkeley and some of its opponents formed an unincorporated association known as Citizens Against Rent Control (CARC) who are the appellants in this case. CARC hired a campaign consultant, engaged in extensive research, published campaign literature, solicited and accepted campaign contributions and generally conducted an active campaign against the measure.

Before the election, a controversy arose concerning Berkeley's intent to enforce the contribution limit contained in section 602. According to CARC, it believed that the city had advised campaign committees that it was not going to enforce section 602; and relying upon that belief, CARC solicited and received a total of $18,600 in contributions, several of which exceeded the $250 limit.

Shortly before the election, the Berkeley Fair Campaign Practices Commission ordered CARC, pursuant to section 604 of the Ordinance, to pay the $18,600 to the general fund. CARC responded by filing a complaint in the Alameda County Superior Court for injunctive and declaratory relief alleging that section 602 was violative of its First Amendment rights and those of other named plaintiffs who desired to make contributions larger than $250. The Superior Court granted a preliminary injunction against enforcement of section 602.

At the Superior Court hearing, CARC submitted uncontroverted evidence in the form of affidavits and declarations that the $18,600 was necessary to conduct an effective campaign against Measure "B;" that CARC solicited and received contributions in excess of $250; that other persons and entities desired to contribute more than $250 to CARC but were reluctant to do so because of the uncertainty of the application of the restrictions imposed by section 602; that to conduct an effective campaign against the complex rent control measure, extensive research and voter contact had to be achieved; and that an experienced professional campaign manager had to be hired in order to conduct the election campaign.

On the other hand, the only evidence submitted by the City of Berkeley was the declaration of Edythe Campbell, City Clerk of Berkeley, who merely stated that the Berkeley Fair Campaign Practices Commission had demanded that CARC surrender the $18,600. No proof was offered to show a compelling governmental interest to justify section 602's severe infringement on First Amendment rights.

The Alameda County Superior Court's decision was appealed, and that decision was upheld by the California Court of Appeal. Thereafter, upon appeal to the California Supreme Court, the trial court was reversed. The California Supreme Court held that section 602 served a compelling governmental interest.

ARGUMENT

I

THE DECISION OF THE COURT BELOW INFRINGES UPON CONSTITUTIONALLY PROTECTED FREE SPEECH RIGHTS.

A. Limiting The Amount A Person Can Contribute To A Committee In A Ballot Election Is A Direct Restraint Upon Free Speech And Political Association.

In a democratic society, it is essential that people have the right, free of governmental control, to communicate their views on issues of importance to them. The Berkeley ordinance operates "in an arena of the most fundamental First Amendment activities." *Buckley* v. *Valeo,* 424 U.S. 1, 14 (1976). It is now elementary that the First Amendment provides the broadest protection to political expression in order "to assure [the]unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States,* 354, U.S. 476, 484 (1957). A major purpose of the First Amendment is "to protect the free discussion of governmental affairs. . . ."[2] *Mills* v. *Alabama,* 384 U.S. 214, 218 (1966).

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[2] This Court has on occasions too numerous to mention affirmed that First Amendment freedoms are essential for all in a democratic society. For as stated in *Thornhill* v. *Alabama* (1940) 310 U.S. 88, 95-96:

(footnote continued on following page)

Limiting the amount of money a person may contribute to a committee composed of others who have similar political beliefs is a direct and unconstitutional infringement upon First Amendment freedoms that are essential for effective political expression. As stated by the Court in *Buckley* v. *Valeo, supra,* at p. 15:

> The First Amendment protects political association as well as political expression. The constitutional right of association explicated in *NAACP* v. *Alabama,* 375 U.S. 449, 460 (1958), stemmed from the Court's recognition that '[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.' Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee '"freedom to associate with others for the common advancement of political beliefs and ideas,"' a freedom that encompasses '"[t]he right to associate with the political party of one's choice."' *Kusper* v. *Pontikes,* 414 U.S. 51, 56, 57 (1973), quoted in *Cousines* v. *Wigoda,* 419 U.S. 477, 487 (1975).

The California Supreme Court erroneously concluded that the Berkeley ordinance was a valid limitation upon campaign

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(footnote continued from preceding page)

> The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be *exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth.* Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgement of freedom of speech . . . impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. (Emphasis added.)

Five years later, this Court, in *Thomas* v. *Collins* (1945) 323 U.S. 516, 537 left no doubt that:

> The First Amendment is a charter for government, not for an institution of learning. "Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts. *Cf. Abrams* v. *United States,* 250 U.S. 616, 624 (1919), and *Gitlow* v. *New York,* 268 U.S. 652, 672 (1925), dissenting opinions of Mr. Justice Holmes. Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given.

contributions. *Citizens Against Rent Control* v. *City of Berkeley, supra,* at 830. This error stemmed from the court's improper reliance upon *Buckley* v. *Valeo, supra,* for the proposition that a campaign contribution limitation is constitutionally valid. According to the court below:

> CARC's assertion that its right to engage in effective political advocacy is affected by a contribution ceiling is answered by the decision in *Buckley.* The high court recognized the constitutional problems that would result if a contribution limit did prevent effective advocacy, but stated: 'The overall effect of the Act's contribution ceiling is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds, on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.' (424 U.S. at pp. 21-22 [46 L.Ed.2d at p. 689].) *Id.,* at 830.

While it is true that the *Buckley* Court upheld a limitation upon campaign contributions to a political candidate, it did *not* validate such limitations when applied to a *ballot* measure. Extending the holding of *Buckley* to ballot measures is a gross misreading of that case. The most obvious error of the court below is that it confused campaign contributions to candidates with campaign contributions to ballot measures and reasoned incorrectly that there is no substantial distinction between the two.

Contrary to this belief, *Buckley* does not stand for the proposition that donations to a campaign committee in a ballot election may be limited. In *Buckley* v. *Valeo, supra,* this Court, citing *CSC* v. *Letter Carriers,* 413 U.S. 548 (1973), expressed concern about the danger that large campaign donations may have on corrupting a politician (or creating the appearance thereof):

> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the

> opportunities for abuse inherent in a regime of large individual financial contributions. In *CSC* v. *Letter Carriers, supra,* the Court found that the danger to 'fair and effective government' posed by partisan political conduct on the part of federal employees charged with administering the law was a sufficiently important concern to justify broad restrictions on the employees' right of partisan political association. *Here, as there, Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'* 413 U.S., at 565. *Buckley* v. *Valeo, supra,* at 27. (Emphasis added.)

After applying the rigorous standards of review necessary for infringing free speech, the *Buckley* Court concluded that "the weighty interests served by restricting the size of financial contributions to *political candidates* are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling." *Buckley* v. *Valeo, supra,* at 29 (emphasis added). However, this rationale does not apply to ballot measures.

A more appropriate analysis, insofar as ballot measures are concerned, would be an analogy to the part of the *Buckley* decision where the Court struck down campaign spending limitations because they imposed an impermissible restraint upon free speech and did not serve a sufficient governmental interest in curbing corruption of politicians:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, section 608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse. *Buckley* v. *Valeo, supra,* at 47.

Thus, the reliance of the California Court upon *Buckley* to support its conclusion that limitations may be placed upon the amount donated to a campaign committee concerning a ballot measure is wholly misplaced.[3]

B. There Is No Compelling Governmental Interest In Limiting The Amount Of Money A Person Can Donate To A Committee To Support Or Oppose A Ballot Measure.

1. A City Must Demonstrate A Compelling Governmental Interest In Limiting Campaign Donations To A Committee In A Ballot Measure Election.

First Amendment freedoms occupy a "preferred position" and cannot be infringed unless the city demonstrates a compelling interest. See *Louisiana* v. *NAACP*, 366 U.S. 293 (1961); *Bates* v. *Little Rock*, 361 U.S. 516 (1960); *NAACP* v. *Alabama*, 367 U.S. 499 (1958).

In *NAACP* v. *Button*, 371 U.S. 415 (1963), this Court noted that:

> The decisions of this Court have consistently held that only a compelling state interest . . . can justify limiting First Amendment freedoms. . . . In *NAACP* v. *Alabama*, 357 U.S. 449, 461, we said, 'In the domain of these indispensable liberties, whether of speech, press or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action.' Later, in *Bates* v. *Little Rock*, 361 U.S. 516, 524 [1960], we said '[w]here there is significant encroachment upon personal liberty, the State may prevail only upon showing of a subordinating interest which is compelling. Most recently, in *Louisiana ex rel Gremillion* v. *NAACP*, 366

[3] The California Court's authority for its conclusion is based upon a law student's incorrect reading of *Buckley*. (See Comment, *The Constitutionality of Limitations on Corporate Contributions to Ballot Measure Campaigns*, 13 U.S.F.L. Rev. 145 (1978). The student based her conclusion, that corporate contributions to a ballot measure campaign may be prohibited, on a faulty premise. Contrary to the assertions in the law review commentary, nothing in *Buckley* suggests that the electorate may be corrupted by its receipt of information from corporate sources. *Buckley* dealt with the possible *quid pro quo* effects that contributions may have on candidates. The *quid pro quo* rationale does not apply to ballot measures.

U.S. 293, 297, we reaffirmed this principle: '. . . regulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights.' *Id.*, at 438-439.

When First Amendment rights are at stake, as in the instant case, the normal presumption of the constitutionality of a statute does not apply if on its face or as applied, it infringes the exercise of First Amendment rights.[4] See *Thomas* v. *Collins*, 323 U.S. 516 (1945); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Schneider* v. *Irvington*, 308 U.S. 149 (1939).

Thus, once it is established that the Berkeley ordinance infringes First Amendment rights, the city bears the heavy burden of showing the existence of a compelling governmental interest sufficient to justify its campaign contribution limit.[5] This burden was not met by the city in the trial court.

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[4] The burden of showing a compelling state interest so fundamental and overriding as to necessitate prohibiting a person from donating more than $250 to a campaign committee lies with the City of Berkeley. (*Elrod* v. *Burns*, 427 U.S. 347 (1976); *NAACP* v. *Button*, 371 U.S. 415, 438-439 (1953); *Welford* v. *Battaglia*, 343 F.Supp. 143, 145 (Del. 1972); see also, Note, *Less Drastic Means and the First Amendment* (1969) 78 Yale L.J. 464; Ely (1970) *Legislature and Administrative Motivation In Constitutional Law* 79 Yale L.J. 1205.)

The fundamental purpose underlying the free speech guarantee is the national commitment to the principle "that debate on public issues should be uninhibited, robust and wide-open" (*New York Times* v. *Sullivan*, 376 U.S. 254, 270) (1964), so that the public may be informed and educated on all views regardless of source.

[5] The court below conceded that strict scrutiny is the appropriate test to be applied in this case:

> Berkeley's first contention is that CARC and the other plaintiffs have failed to show infringement of their First Amendment rights so as to require it to demonstrate that section 602 serves a compelling governmental interest by the least restrictive means. CARC responds that certain affidavits before the trial court furnished adequate evidence both that its ability to engage in effective political advocacy was impaired and the associational rights of its contributors were significantly controlling federal decisions appear to hold that monetary restrictions on election campaigns will be deemed to require strict scrutiny. Thus in *Buckley* the court differentiated contribution from expenditure limitations, stating that the former resulted in 'only a marginal restriction' and 'little direct restraint' on political communication. (424 U.S. at pp. 20-21 [46 L.Ed.2d at pp. 688-689].) However, despite the finding of marginal effect the court invoked strict scrutiny in considering the constitutionality of the contribution limitations. (*Id.* at pp. 23-38 [46 L.2d. 20 at pp. 690-699].) *We likewise give the challenged ordinance stringent review. Id.* at 824. (Emphasis added.)

In attempting to articulate a compelling governmental interest for Berkeley's infringement of protected rights, the court below advanced several interests for Berkeley's action that cannot withstand scrutiny. Citing several law review articles,[6] the California Court concluded that large donations to campaign committees, although "not raising all the same problems as candidate elections, in which large campaign contributions risk creating future 'political debts,' " nevertheless have a corrupting effect upon the electorate. *Citizens Against Rent Control* v. *City of Berkeley, supra,* at 826. With no evidence other than commentaries, the California Court found a compelling governmental interest in limiting campaign donations to a committee:

> The finding, all too common in commentaries on the initiative and referendum, that direct legislation is 'enormously expensive to produce and is largely a tool of interest groups,' appears to have inspired measures like the Berkeley ordinance, which attempt a return to the primary goals of the initiative and referendum. (Crouch, et al. Cal. Governmental and Politics (3d Ed. 1964) p. 108.) When large contributors use the power of their purse to overcome the power of reason, they thwart the intended purpose of the initiative or referendum; instead of fostering participation by a greater segment of the electorate, the vision of direct democracy is transformed into a tool of narrow interests. (Nicholson, *Buckley* v. *Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974,* 1977 Wis.L.Rev. 323, 330). *Id.,* at 827.

Since there was no evidence in the trial court to substantiate its beliefs of "corruption" of the political process by large campaign donations, the court below offered as further support for its position the unsubstantiated views of political com-

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[6] Diamond, *California's Political Reform Act: Greater Access to the Initiative Process* (1974) 7 Sw. U. L. Rev. 453, 455-463; U. S. F. Comment, p. 164. Note, *The California Initiative Process: A Suggestion for Reform* (1975) 48 So. Cal. L. Rev. 922, 923-924; Comment, *The Constitutionality of Limitations on Corporate Contributions to Ballot Measure Campaigns,* 13 U. S. F. L. Rev. 145 (1978).

mentators,[7] none of whom presented any evidence in the trial court to demonstrate Berkeley's compelling interest in limiting campaign donations:

> Commentators on our political scene have recognized the nexus between voter apathy and large campaign contributions: 'The mass of citizens have tended to shun the opportunity to donate to campaign coffers and to participate in other forms of political activity because they felt their limited resources would be outmatched by a small group of rich and influential 'angels'. . . . [This feeling] has also inspired the emergence of a growing sense of estrangement of disaffection from public institutions and leaders.' (Berg et al. Corruption in the American Political System (1976) 47-50.) The result of this phenomenom is *decidedly* negative: 'By abandoning the field of battle, the average voter leaves the *political* wars to be fought by big contributors and powerful interests.' (*Id.*, at p. 51.) *Citizens Against Rent Control* v. *City of Berkeley, supra* at p. 828.

Yet, nothing in the record of the trial court demonstrated any of the problems alleged by the cited political commentators.[8] The views of the law review and political com-

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[7] See also Shockley, *The Initiative, Democracy and Money: The Case of Colorado* (1976) Printed in Hearings Before the Subcommittee on the Constitution of Sen. Com. on Judiciary on S. J. Res. 67, 95th Cong., 1st Sess., at pp. 188-189 (1977); Radabaugh, *Tendencies of California Direct Legislation* (1961), *Id.*, at p. 179.

[8] The dissenting opinion in the court below clearly points out that no compelling interest was demonstrated in the trial court:

> What, then, is the compelling interest requiring imposition of a restraint so substantial on two rights so fundmental? The majority identifies it thus: 'large contributions to a local ballot measure campaign threaten our electoral system and potentially pervert the purpose of initiative procedures;. . .' My colleagues of the majority urge a theory that public confidence in the electoral processes is undermined by permitting unrestricted contributions in ballot measure elections. It is noteworthy that it is not the *fact* of a danger but the *potential* of a danger that alone generates the compelling interest found by the majority. *It will readily be seen that this wholly untested political hypothesis is not based upon any record but rather upon the opinions and conclusions of 'commentators on our political scene,' 'a political scientist,' or a 'student of the California initiative process.'* (*Citizens Against Rent Control* v. *Berkeley, supra*, at 835, (Richardson J., dissenting, emphasis added.)

mentators cited by the court as justification for the Berkeley ordinance are neither universally shared nor accepted.[9] In the *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), this Court clearly answered the unsubstantiated arguments advanced by the commentators relied on by the California Court below, when Mr. Justice Powell, writing for this Court, rejected the notion that ballot measures, similar to candidates, are likely to be corrupted by large campaign spending:

> *Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections,* e.g., *United States* v. *Automobile Workers, supra; United States* v. *CIO, supra, simply is not present in a popular vote on a public issue.* To be sure, corporate advertising may influence the outcome of the vote; this would be its purposes. But the fact that advocacy may pursuade the electorate is hardly a reason to suppress it. The Constitution 'protects expression which is eloquent no less than that which is unconvincing.' *Kingsley Int'l Pictures Corp.* v. *Regents*, 360 U.S., at 689, 3 L.Ed.2d 1512, 79 S.Ct. 1362. *Id.*, at 790-791. (Emphasis added.)

And, in *Schwartz* v. *Romnes*, 495 F.2d 844 (2nd Cir. 1974), the Court of Appeals for the Second Circuit, in a well reasoned opinion, also rejected the argument that contributing money to a ballot measure has a corrupting effect on the electorate.[10] The court noted that there is a difference between

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[9] See generally, Note, *The Unconstitutionality of Limitations on Contributions to Political Committees In the 1976 Federal Election Campaign Act*, 86 Yale L.J. 9531 (1977); Ely, *The Supreme Court, 1977 Term*, 92 Harv. L. Rev. 5, 163 (1977); Redish, *Campaign Spending Laws and The First Amendment*, 46 N.Y.U.L. Rev. 900 (1971); Clagett and Bolton, *Buckley* v. *Valeo*, 29 Vand. L. Rev 1327 (1976).

[10] In *Schwartz* v. *Romnes*, *supra*, at 851, the court noted that:

> Corporate funds paid to a candidate or political party have the potential of creating debts that must be paid in the form of special interest legislation or administrative action. *In contrast, when the issue is one to be resolved by the public electorate monies paid by a corporation for public expression of its views create no debt or obligation on the part of the voters to favor the corporate contributors' special interest.* Although large private companies have undoubtedly been tempted to "buy" the election of political candidates in the expectation of receiving favors if their candidates should be elected, it is difficult to see how much motivation would play any substantial role in an attempt to influence votes for or

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donating money to a candidate and making similar donations to a ballot measure.[11] As correctly observed by the court:

> Whatever the justification for prohibiting contributions that are prone to create political debts, it largely evaporates when the object of prohibition is . . . *contributions to a*

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against a referendum. The public remains completely free to reject the views of the corporate contributor, just as it did in the present case, without fear of retribution or non-support by the corporate contributor. The requirement of section 320 that the corporation publicly disclose such expenditures minimizes the risk that the public will be misled as to the source or inspiration of the corporately-financed views. (Emphasis added.)

[11] Other courts have expressed similar views when confronted with the issue of whether there is a compelling governmental interest in limiting campaign expenditures in a ballot measure election. For example, in *Bare* v. *Gordon*, 84 Wash.2d 380, 526 P.2d 379 (1974), the Washington Supreme Court responded:

> Defendants argue as a matter of policy that one of the overriding and, therefore, justifying purposes of the act *is to prevent monied interests from drowning out the voices of the less affluent.* We acknowledge the state's interest in promoting an open, honest, and effective electoral process. We held in *State* v. *Conifer Enterprises, Inc.*, 82 Wash.2d 94, 508 P.2d 149 (1973), that such a goal was sufficient to meet the stringent, compelling interest test. However, it is far from certain that section 14 serves to accomplish the desired goal. For example, the affluent could spend the maximum amount allowable under section 14 in one concentrated campaign promotion, thereby precluding further effective political communication on the same side of the issue, affecting rich and poor alike. Conceivably, then, the power of money is decreased, not diminished, by section 14. *Id.*, 526 P.2d at 383. (Emphasis added.)

See also *Deras* v. *Myers*, 535 P.2d 541 (Ore. 1975) where the Oregon Supreme Court asserted:

> . . . *There is no evidence in this case, not any data in the studies on campaign expenditures discovered in our research, which would lead to the conclusion that our system of government is imperiled by the free expenditure of funds in political campaigns.* Conceding for the purposes of this case that limitation and control of campaign expenditures is of great importance in the catalogue of our social and political needs, the good it proposes to accomplish must be weighed against the danger which it generates in restraining our citizens from freely expressing their view. In weighing these competing interests, one must recognize the importance of the electorate's liberties of expression of opinion and assembly in the overall system of government established by our state and federal constitutions. These rights have been termed the 'cornerstone of democracy' and so important as to require 'breathing space' and protection even from the 'chilling effect' of overbroad and ambiguous statutory restrictions. *Id.*, at 545. (Emphasis added.)

public referendum. The spectre of a political debt created by a contribution to a referendum campaign is too distant to warrant this further encroachment on First Amendment rights. Against a background on such attenuated danger, we decline here, as we did in *United States* v. *National Committee for Impeachment*, 469 F.2d 1135, 1142 (1972), to ascribe to the legislator an intention to regulate, perchance prohibit, the expression of opinion on fundamental issues of the day. *Id.*, at 852-853. (Emphasis added.)

2. The Governmental Interest Allegedly Served By The Berkeley Ordinance Is Illusory.

According to the court below, the "Berkeley ordinance . . . seeks to reverse the trend toward loss of confidence in our political system and apathy in elections by assuring voters that their participation, whether in the form of money or services, are significant. We conclude that the interest served by the ordinance should be recognized as compelling." *Citizens Against Rent Control* v. *City of Berkeley, supra*, at 829.

Supposedly, the donation limitation of the Berkeley ordinance will restore confidence in the political process and will assure voters that their votes and participation are significant. In accomplishing this asserted interest, Berkeley, on the one hand, contends that a person is still free to spend an unlimited amount of money in a ballot measure election so long as it is not donated to a committee. On the other hand, the city asserts that if that same person decides to contribute the same amount he would have spent individually to a committee, that donation would then have a corrupting effect on the electorate and would make voters feel that their participation is insignificant.

The underlying assumption of this position is that if a limit is placed upon the amount of money a committee can receive, less money will be spent in an election and the potential for corruption is therefore less.[12] However, if there can be no limit

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[12] Restrictions on the size of contributions to a campaign committee, when examined rationally, have no impact on a ballot measure insofar as corruption is concerned:

Appellants also contend that the restrictions upon the size of contributions to a single committee are necessary to promote adequate disclosure about

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placed upon the right of an individual to spend money in a ballot measure election, it does not make sense to limit the amount that same person can donate to a committee. To do so would be to accomplish an illusory goal.

For example, if a person expends $20,000 individually in a local election this would not violate the law and would, under the theory of the Berkeley ordinance, not have a corrupting effect upon the electorate. But, if 50 persons donated $300 each to a committee and this represented the total expenditure of the committee, the Berkeley ordinance would prohibit these 50 persons from pooling their resource to expend $15,000 while allowing the person who spent the $20,000 to do so with impunity. How is the electorate harmed more from the $15,000 expenditure by the committee than it is by the $20,000 by the individual?

It is irrational to assume that merely because people may pool their resources into a committee and expend their collective funds either in support of or in opposition to a ballot measure this will have a corrupting effect on the electorate.[13]

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who is financing a campaign. In the absence of these restrictions, appellants contend that corporations and wealthy individuals would mask their participation in a referendum campaign by funneling large sums of money into a committee which the public would see only under an innocuous title such as 'Let's Help Florida' or 'Dade Voters for a Free Choice.' Although promoting disclosure of campaign contributors is an important state interest, the restrictions upon political contributions in section 106.08(1)(d)(e) cannot be justified as disclosure measures because the statutes are not closely drawn to avoid unnecessary abridgment of associational freedoms. *These statutes that restrict the amount a person may contribute to a single committee do little to promote disclosure.* The primary effect of the statutes is to compel large contributors who support or oppose a referendum issue to form multiple partisan committees, each of which can receive the maximum amount from a single contributor under the statute. These multiple committees provide no additional disclosure; the public still sees only the innocuous names of the different committees, and not the identities of the underlying contributors. *Let's Help Florida* v. *McCrary*, 621 F.2d 195, 200 (5th Cir. 1980). (Emphasis added.)

[13] There is no demonstrated need for Berkeley to limit the ability of a committee to disseminate its views. Limiting the amount of money that may be donated to a committee serves only to curtail the protected speech of a committee. Government, in the absence of a compelling interest, is without power to silence a committee. In *Cohen* v. *California*, 403 U.S. 15 (1971), this Court pointed out:

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The electorate would be no more harmed by the expenditure of $15,000 by a committee than it would be by the expenditure of $20,000 by a single person. As a matter of fact, the voter would be exposed to more information, in this instance, than if a committee had spent the money to disseminate information.

In the final analysis, it is illusory to set up such a scheme allegedly to protect the voters from corruption.[14] In each instance, whether the money is spent by a person or by a committee, it is spent to disseminate information regarding the ballot measure. Whether the information received by the voter comes as a result of being paid for by a committee, rather than an individual, has no demonstrable effect on the voter and cannot possibly harm him. Unlike candidates, ballot measures, as inanimate objects, do not lend themselves to the possibility of the *quid pro quo* corruption between a contributor and a candidate[15] as explained by the Court in *Buckley* v. *Valeo, supra,* at 26-29.

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> While this court has recognized that government may properly act in many situations to prohibit intrusions into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the dialogue [citation omitted], we have at the same time consistently stressed that "we are often 'captive' . . . and subject to objectional speech" [citation omitted]. *The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.* Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections. *Cohen* v. *California, supra,* at 21, (emphasis added.)

[14] A similar protective scheme was rejected in *First National Bank of Boston* v. *Bellotti supra,* at 790, n. 29.

> Appellee contends that the State's interest in sustaining the active role of the individual citizen is especially great with respect to referenda because they involve the direct participation of the people in the lawmaking process. But far from inviting greater restriction of speech, the direct participation of the people in a referendum, if anything, increases the need for 'the widest possible dissemination of information from diverse and antagonistic sources. (Citations omitted.)'

[15] Justice Richardson, in his dissent in the court below, aptly explained the untenability of the majority's unwarranted conclusion that allowing unlimited donations to a campaign committee will threaten the political process:

> The majority's conclusion that there is such a "threat" to our electoral system thereby "potentially" inhibiting the initiative process may or may not be correct. *There is no record before us and in this*

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In *Let's Help Florida* v. *McCrary*, 621 F.2d 195 (5th Cir. 1980) the court, citing *First National Bank of Boston* v. *Bellotti*, *supra*, explained how a state's interest is not advanced by attempting to limit spending in an election concerning a ballot measure:

> The state's interest in preventing the actual or apparent corruption of candidates, which the Supreme Court found so compelling in *Buckley*, does not justify restrictions upon political contributions in referendum elections. When people elect a candidate, they choose someone to whom they can delegate their political decisionmaking. The people's need to prevent large contributors from improperly influencing this representative decisionmaker is critical. *In contrast when people vote on a referendum proposal, they directly decide the pertinent political issue for themselves. Large contributions for publicity by one group or another do not influence the political decisionmakers*—in this case, the voters themselves—except in a manner protected by the first amendment. *Let's Help Florida* v. *McCrary*, *supra*, at 199-200. (Emphasis added.)

Thus, when section 602 is analyzed rationally, in view of the governmental interest it allegedly seeks to advance, it becomes clear that the purported interest is illusory.

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connection the procedural posture of the case should be noted. The trial court granted summary judgment in favor of the citizens' committee which attacked the ordinance. Assuming, only for purposes of analysis, that the trial court was improvident in the entry of its summary judgment invalidating the ordinance, it is manifestly unfair for the majority on the other hand to sustain the ordinance without affording the citizens' committee an opportunity to challenge or rebut the opinions and views of the 'commentator,' 'political scientist,' and 'student' on which the majority wholly relies. *The study of a Colorado ballot measure, or a 16-year-old analysis which concludes that the California initiative and referendum process is "largely a tool of interest groups" would make interesting background material for a political debate. Unquestioned and unverified, however, these opinions do not constitute the hard evidentiary support needed to demonstrate a state's present and compelling interest in the suppression of the multiple First Amendment rights of our California citizens. The existence of such a threat and its potential are wholly undocumented.* Indeed the only empirical data that appear in the record are studies of spending on statewide initiative campaigns in California during the period 1954-1974. The studies conducted by a Sacramento research organization, reveal that in 28 statewide contests the highest spenders won 14 times and lost 14 times. I must leave to the reader what the arithmetic proves. *Citizens Against Rent Control* v. *City of Berkeley*, *supra*, at 835-836, (Richardson, J. dissenting, emphasis added.)

II

THE FIRST AMENDMENT PROHIBITS GOVERNMENT FROM LIMITING THE SPEECH OF SOME IN ORDER TO ENHANCE THE VOICES OF OTHERS.

The obvious intent of the Berkeley ordinance is to limit the ability of a committee to disseminate its view because others may not have equal means of disseminating their views.[16] Even though this "noble" governmental purpose may appear reasonable, it collides head-on with the First Amendment. Restricting the speech of those who have the means, financially or otherwise, of expressing their ideas so as not to place persons with less effective means of communicating their views at a disadvantage, has been expressly rejected by this Court. *Buckley* v. *Valeo, supra,* at 48-49.

Moreover, not only has the concept of equalizing the voices of others been rejected, but also the idea of limiting the advocacy of those with means of communicating, because others do not have equal means of advocacy, has been rejected. *Buckley* v. *Valeo, supra,* at 48-49. This Court made it clear in *Buckley* that government cannot limit the speech of some in order to enchance the relative voices of others:

> *But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment,*

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[16] According to the court below:

> In *Buckley* the court recognized the potential for corruption of the electoral process in a regime of large contributions in candidate elections. (424 U.S. at pp. 26-27 [46 L.Ed.2d at p. 692].) Here, it is argued that the electoral process is similarly corrupted by such contributions because voters lose confidence in our governmental system if they come to believe that only the power of money makes a difference. In another context we recognized the danger of such a loss of confidence: 'One disturbing phenomenon of the current political scene of which we may take judicial notice is an apparent substantial increase in voter apathy. The erosion and decay caused by the acid of indifference, unconcern, and lack of participation, if prolonged, may pose a danger to the democratic institutions, far more subtle and invidious than any other. *Johnson* v. *Hamilton* (1975) 15 Cal.3d 461, 471 [125 Cal.Rptr. 129, 541 P.2d 881]'. *Citizens Against Rent Control* v. *City of Berkeley, supra,* at 827.

which was designed 'to secure "the widest possible dissemination of information from diverse and antagonistic sources," ' and ' "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." ' *New York Times Co.* v. *Sullivan, supra,* at 266, 269, 11 L.Ed.2d 686, 84 S.Ct. 710, 95 ALR2d 1412, quoting *Associated Press* v. *United States,* 326 U.S. 1, 20, 89 L.2d. 2013, 65 S.Ct. 1416 (1945) and *Roth* v. *United States,* 354 U.S., at 484, 1 L.Ed.2d 1498, 77 S.Ct. 1304, 14 Ohio Ops.2d 331. *The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.* Cf. *Eastern R. Conf.* v. *Noerr Motors,* 365 U.S. 127, 139, 5 L.Ed.2d 464, 81 S.Ct. 523 (1961). *Buckley* v. *Valeo, supra,* at 48-49. (Emphasis added.)

The decision of the California Court is pregnant with suggestions that large money interests must be curtailed in ballot elections in order to restore confidence in the electoral process.[17] *Citizens Against Rent Control* v. *City of Berkeley, supra,* at pp. 825-831. Accordingly, the court erroneously held

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[17] For example, the California Court intimates that there is usually something sinister about unlimited expenditures by individuals and corporations:

> It could be contended that unlimited expenditures by individuals and corporations can be as sinister as unlimited contributions to committees, and that the activities of committees can be as essential to the political process as those of individuals and corporations. While as a broad proposition that viewpoint may be arguable, it is a value judgment. On such matters, we yield to the legislative determination.
>
> The contrary legislative determination here is not without a tenable rationale. Campaign committees are generally shrouded in anonymity, often adopting seductive names promising to save taxes, preserve resources, or prevent crime. While committees must ultimately identify their donors, the campaign propaganda and the identification are not simultaneous; inducements are disseminated and voter impressions are formed substantially before the sources of committee financing are revealed. On the other hand, when political views are expressed directly by individuals or covertly through committees, the voters are immediately made aware of the interested parties and can evaluate their motivation. *Citizens Against Rent Control* v. *City of Berkeley, supra,* at 831.

For a rebuttal to this argument that the Berkeley ordinance reduces the possibility of anonymity, see *Let's Help Florida* v. *McCrary, supra,* at 780 cited heretofore in footnote 12.

that Berkeley may enhance the voices of some of its citizens by abridging the right of others to make campaign donations in excess of $250 to a campaign committee. This notion was disapproved by the *Buckley* Court:

> Neither the voting rights cases nor the Court's upholding the Federal Communications Commission's fairness doctrine lends support to appellees' position that the First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society.
>
> Cases invalidating governmentally imposed wealth restrictions . . . rest on the conclusion that wealth 'is not germane to one's ability to participate intelligently in the electoral process' and is therefore an insufficient basis on which to restrict a citizen's fundamental right to vote. [Citations omitted.] ***But the principles that underlie invalidation of governmentally imposed restriction on the franchise do not justify governmentally imposed restrictions on political expression. Democracy depends on a well-intentioned electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues.*** *Buckley* v. *Valeo, supra,* at 49, n. 55. (Emphasis added.)

When the underlying rationale of section 602 is examined, it becomes evident that the section assumes unnecessarily that monied interests will combine their resources and outspend their opponents. To help ensure that this does not happen, the ordinance places a $250 limitation on donations that may be made to a campaign committee. By the $250 limit, the section is designed to equalize spending on both sides of the initiative. Yet, at the same time, any one of the monied interests could, if it desired, spend an unlimited amount of money—far in excess of the money spent by any campaign committee—to oppose or support the ballot measure. What then is the interest served by trying to equalize spending by campaign committees?

That interest, at most, is the kind of paternalism that has been previously rejected by this Court. For example, in *First National Bank of Boston* v. *Bellotti, supra,* at 791, n.31, this

Court said that "Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves." So, if a person can spend individually as much as, or more than, a committee, the paternalistic approach of the statute does not achieve its goals of equalizing the competing voices in a ballot election.[18] There is simply no room, consistent with the First Amendment, for this attempt at equalizing competing voices in a ballot measure election.

III

BERKELEY'S ORDINANCE LIMITING THE AMOUNT THAT MAY BE CONTRIBUTED TO A CAMPAIGN COMMITTEE PLACES AN IMPERMISSIBLE RESTRAINT UPON THE RIGHT OF VOTERS TO RECEIVE INFORMATION FROM ALL SOURCES.

Implicit, if not explicit, in the First Amendment is the right of the public to know. To be knowledgeable the public must be free to receive information on all subjects and from all sources. As Professor Lawrence Tribe has observed: "A right to speak may be said to exist when the Court will not allow government to justify a restriction on expressive conduct by a claim that the ideas or information expressed are dangerous; that the speaker may exercise liberty of expression in some places, time, or manner; *or that the speaker should be muffled in order that a diversity of viewpoints might be heard in the market place of ideas.*" Tribe, *American Constitutional Law* (1978) at p. 675. (Emphasis added.)

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[18] The *Bellotti* Court rejected a similar paternalistic approach:

> The State's paternalism evidenced by this statute is illustrated by the fact that Massachusetts does not prohibit lobbying by corporations, which are free to exert as much influence on the people's representatives as their resources and inclinations permit. Presumably the legislature thought its members competent to resist the pressures and blandishments of lobbying, but had markedly less confidence in the electorate. If the First Amendment protects the right of corporations to petition legislative and administrative bodies, see *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510-511, 30 L.Ed.2d 642, 92 S.Ct. 609 (1972); *Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138, 5 L.Ed.2d 464, 81 S.Ct. 523 (1961), there hardly can be less reason for allowing corporate views to be presented openly to the people when they are to take action in their sovereign capacity. *First National Bank of Boston* v. *Bellotti, supra*, at 791, N.31.

Unfortunately, the California Court ruled that campaign donations to committee should be "muffled in order that a diversity of viewpoints might be heard."[19] But the First Amendment protects the public's right to acquire desired information or ideas free of governmental veto or interference.[20]

The voters need to be aware of all viewpoints in an election because free "access to discussion, debate and the dissemination of information and ideas" (*First National Bank of Boston* v. *Bellotti, supra,* at 783), is fundamental to the basic premise of democracy. That basic premise is that people are presumed to have a certain amount of intelligence, and that they should be able, without governmental interference, to evaluate materials and make their own decisions about their worth:[21]

> Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. *They may consider in making their judgment the source and creditability of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced . . . it is*

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[19] In the decision below, the court surmised that: "When large contributors use the power of their purse to overcome the power of reason, they thwart the intended purpose of the initiative or referendum: instead of fostering participation by a greater segment of the electorate, the vision of direct democracy is transformed into a tool of narrow interest." *Citizens Against Rent Control* v. *City of Berkeley, supra,* at 827.

[20] See, e.g., *Meyer* v. *Nebraska,* 262 U.S. 390 (1923) (reversing a conviction for teaching German in violation of a state law prohibiting the teaching of foreign language to young children, in part because the law interfered "with the opportunities of pupils to acquire knowledge"); *Stanley* v. *Georgia,* 394 U.S. 557 (1969) (reversing a conviction for possession of pornographic material in defendant's home; such application of the statute held to interfere with the possessor's rights to know and to be free of unwarranted intrusions into privacy).

[21] This point has been aptly stated by one commentator:

> The Court [in Bellotti] properly deemed it safe to entrust the marketplace of ideas to private and diverse individuals and groups than to allow state controls over speakers and messages. The Court's approach is consistent with recent decisions invalidating paternalistic state restrictions on commercial speech. The public can be trusted to evaluate political and commercial messages in light of their sources before making political and consumer decisions. Ely, *supra,* 92 Harv. L. Rev. at pp. 168-169.

a danger contemplated by the framers of the First Amendment. First National Bank of Boston v. *Bellotti, supra,* at pp. 791-792. (Emphasis added.)

Furthermore, in *First National Bank of Boston* v. *Bellotti, supra,* the Court specifically rejected the paternalistic approach adopted by the California Court below, when it observed that: "The First Amendment rejects the 'highly paternalistic' approach of statutes . . . which restrict what people may hear." *Id.* at p. 791, n.31.

Regardless of Berkeley's alleged interest in restoring confidence in the political system (assuming such has in fact been lost) it cannot restore that confidence by allowing unlimited expenditures on the part of individuals on the one hand, and on the other hand restricting the ability of a committee to freely participate in the electoral process.[22] Government cannot, consistent with the First Amendment, limit the voters' access to the information available for dissemination by committees. Restricting the amount of money a committee may have at its disposal in an election limits the committee's ability to communicate its views and therefore limits the ability of the voters to receive such information.[23]

To communicate ideas and viewpoints in an election is costly. Without sufficient funds, the reality of life is that views cannot be communicated and voters are deprived of information. To the extent a limit is placed upon contributions to a committee, that limitation reduces the quantity of information

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[22] "The inherent worth of speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual." *First National Bank of Boston* v. *Bellotti, supra,* at p. 777. Moreover, continued the Court: "Freedom of expression has particular significance with respect to government because '[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.' T. Emerson, Toward a General Theory of the First Amendment 9 (1966). See also A. Meiklejohn, Free Speech and Its Relation to Self-Government 24-26 (1948)." *Id.*, at p. 777, n.11.

[23] By prohibiting a committee from receiving a contribution of more than $250 from any one source curtails the committee's right to engage in political expression. According to the Court in *Buckley* v. *Valeo, supra:* "Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.*, at p. 19, n. 18.

available. In *Buckley* v. *Valeo, supra,* where an attempt was made to limit campaign expenditures, the Court warned that:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quality of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. *This is because virtually every means of communicating ideas in today's mass society require the expenditure of money.* The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. *The electorate's increasing dependence on television, radio, and other media for news and information has made these expensive modes of communication indispensable instruments of effective political speech. Id.,* at p. 19.

IV

SECTION 602 OF THE ORDINANCE DENIES EQUAL PROTECTION OF THE LAW TO THOSE WHO POOL THEIR RESOURCES TO COMMUNICATE THEIR POLITICAL VIEWS.

Legislative classifications which infringe fundamental rights, such as participating in the electoral process, are strictly scrutinized and are held to be violative of the Equal Protection Clause unless a compelling governmental interest can be shown. See *Tribe, supra,* at p. 1002. Those who seek to pool their resources by making campaign contributions to a committee are entitled to equal protection of the law. When a statute treats persons differently with respect to the exercise of fundamental constitutional rights, the statute violates the Equal Protection Clause unless the difference in treatment can be justified by a compelling state interest. See *Reynolds* v. *Simms,* 377 U.S. 533, 562 (1964); *Sherbert* v. *Verner,* 374 U.S. 398, 406 (1963); *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942); see also *Developments in the Law—Equal Protection* (1962) 82 Harv. L.Rev. 1064, 1120-1131.

Under the strict standard of review applied in these cases, the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the differences imposed by the law are necessary to further that purpose.[24] See *Hall* v. *Beals*, 396 U.S. 45, 52 (1969) (Justice Marshall, dissenting).

Section 602 of the Berkeley ordinance clearly draws a distinction between those who donate to a committee and those who make direct expenditures toward a ballot measure. A person, under the ordinance, may expend any amount desired either for or against a ballot measure. But if a group of people pool their money together, by forming a committee, section 602 limits each contributor to $250.

The court below concluded that this distinction served a compelling governmental interest in that it "seeks to reverse the trend toward loss of confidence in our political system and apathy in elections by assuring the voters that their vote and their participation, whether in the form of money or services, are significant." *Id.*, at 829. In explaining its reason for limiting the amount a person may contribute to a committee, the California Court stated:

> [T]he Berkeley ordinance places no limit on expenditures, and permits contributions from any source in amounts up to $250. Thus, an individual or business entity that believes its interests are benefited or threatened by a proposed ballot measure remains free to spend money in unlimited amounts, by mass advertising or any other method, to inform the public of its reasons why the measure should be defeated. ***However, in order to maintain the initiative and referendum processes as a tool of direct democracy for the people, individuals of business entities are prohibited from contributing more than a modest sum to a measure.*** *Id.*, at 829. (Emphasis added.)

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[24] When reviewing statues which touch upon "fundamental interest," courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny [where] . . . the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose." *Johnson* v. *Hamilton*, 15 Cal.3d 461, 466 (1975); see also, *Weber* v. *City Council*, 9 Cal.3d 950, 958-959 (1973); *Thompson* v. *Mellon*, 9 Cal.3d 96, 99, n.2 (1973).

On its face, the court's rationale cannot withstand scrutiny. If the evil sought to be eliminated, as the court suggests, is to prevent "loss of confidence in our political system . . . by assuring the voters that their votes and their participation . . . are significant" (*Id.*, at 829), then the $250 limitation on the amount that may be donated to a committee does not serve that end. By limiting to $250 the amount a person can donate to a committee while on the other hand allowing that same person to spend any amount desired either for or against a ballot measure, does not further the purpose of the ordinance nor does it serve a compelling governmental interest.

As the Court pointed out in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), when a fundamental right (expressing views in the electoral process is such a right) is infringed, a compelling governmental interest, not just a rational relationship, must be shown. In *Shapiro*, which dealt with welfare benefits and the fundamental right to travel, the Court observed:

> At the outset, we reject appellants' argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification. See *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911); *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960); *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961). The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and *any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.* Cf. *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942); *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944); *Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960); *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963). *Id.*, at 634. (Emphasis added.)

If people can spend unlimited amounts of money individually on local ballot elections, there is certainly no compelling governmental interest served in limiting donations to a committee which may spend that same amount of money. Unless it

can be shown that the committee process itself has a corrupting influence on the electoral process, a difference, without even a rational basis, is clearly established. The underlying premise of the Berkeley ordinance is a false premise. It presumes that a committee's expenditure of money, merely because it may come from many sources, will necessarily be greater than that of an individual's and will therefore purchase too much speech and thereby corrupt the electorate. There is no support for this unwarranted assumption.[25]

Whether a committee spends money in a ballot election or whether an individual spends an equal amount as spent by the committee or less cannot be the determinant for infringement of a fundamental right. There is an "equality of status" of ideas in the marketplace whether expressed by individuals or by committees. For example, in *Police Department of the City of Chicago* v. *Mosley*, 408 U.S. 92 (1972) the Court made it clear that:

> There is an 'equality of status in the field of ideas,' and government must afford all points of views an equal opportunity to be heard. . . .
>
> Guided by these principles, we have frequently condemned such discrimination among different users of the same medium for expression. *Id.*, at 96.

Not only is there no compelling governmental interest in treating committees differently from persons, such a distinction is not even rationally related to the city's alleged objective. Therefore, it violates the Equal Protection Clause.

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[25] In answering the majority's presumption of corruption, the dissent correctly observed:

> Moreover, the majority does not attempt to answer Justice Rouse's perceptive analysis of the meaning of 'corruption' within the initiative context: '*The term 'corrupt' implies the existence of expectation of a political quid pro quo. In addition, the term 'corruption' subtly conveys the impression that there is a deviation from an objective standard. Such a belief can have no validity. In a democratic system, objective 'truth' is that which the majority subjectively chooses to adopt.* Hence it is delusive to maintain that a declaration by the electorate can be 'corrupt'. The price of free speech is that we must put up with opinions which we may deem to be the purest humbug, untainted by any trace of truth. . . . *(N.A.A.C.P.* v. *Button* [1963] 371 U.S. 415, 445.)' *Citizens Against Rent Control* v. *City of Berkeley, supra*, at 837-838 (Richardson, J. dissenting, emphasis added.)

V

CONCLUSION

Amicus Curiae respectfully urges this Court to reaffirm the fundamental principle that free speech means that government cannot limit the speech of committees in order to enhance the relative voices of others. The First Amendment mandates that there be an uninhibited flow of information and ideas from all sources in a ballot measure election without governmental limitations upon the amount a person may donate to a committee to either support or oppose such a measure. Therefore, Amicus Curiae respectfully submits that the judgment of the California Supreme Court should be reversed.

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